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**UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

LEWIS F. GEER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 01-2583-JAR
)	
WILLIAM D. COX, et al.,)	
)	
Defendants.)	

**ORDER DENYING WITHOUT PREJUDICE MOTIONS TO DISMISS
AND FOR JUDGMENT ON THE PLEADINGS**

On January 3, 2002, the Court entered a Memorandum Order and Opinion Granting in Part and Denying in Part Defendant's Motions to Dismiss and Strike (Doc. 116). As part of its ruling, the Court dismissed Count I against defendant TransFinancial Holdings, Inc. ("TransFinancial") based on the conclusion that under the circumstances of this case, the claim against the corporation for breach of Section 271 of the Delaware corporate code must be brought derivatively rather than directly. The Court also dismissed derivative Count III conversion claims against Central States Pension Funds ("Pension Fund") and Bankers Trust Company ("the Bank").

Since that order was entered, plaintiff has amended his complaint and defendant R & L Transfer Inc. ("R & L") has filed a cross-claim against third party defendant Crouse Cartage Company ("Crouse"). The following motions to dismiss have been filed:

Motion to Dismiss Third Party Complaint (Doc. 121), filed by Crouse Cartage Company;
Motion to Dismiss Counts I and III (Doc. 132), filed by the Individual Defendants;

Motion to Dismiss Class and Derivative Complaint (Doc. 143), filed by defendant R & L; Motion to Dismiss R & L Cross-claim (Doc. 147), filed by TransFinancial; Motion for Judgment on the Pleadings or in the Alternative, to Dismiss (Doc. 153), filed by the Individual Defendants.¹

The Court adopts the relevant facts and analysis set forth in its previous Order (Doc. 116), and will not restate them here, except as necessary for clarification.

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief,² or when an issue of law is dispositive.³ The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations,⁴ and all reasonable inferences from those facts are viewed in favor of the plaintiff.⁵ The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims.⁶ A motion for judgment on the pleadings pursuant to Rule 12(c) provides a means of disposing of cases when the material facts are not in dispute and a

¹There are also pending motions for sanctions filed by the secured creditors (Docs. 123 and 125) as well as a motion to certify class (Doc. 70), which are addressed in separate orders.

²*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998).

³ *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

⁴ *Maher*, 144 F.3d at 1304.

⁵ *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984).

⁶*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

judgment on the merits can be achieved by focusing on the content of the pleadings.⁷ A motion for judgment on the pleadings is governed by the same standards as a motion to dismiss under Rule 12(b)(6).⁸

1. Individual Defendants’ Motion to Dismiss (Doc. 132).

As a result of the Court’s January 6 order, defendants William D. Cox, Roy R. Laborde, Timothy P. O’Neil, Harold C. Hill, Jr. and Clark D. Stewart (“Individual Defendants”) moved the Court for leave to file a Motion to Dismiss Counts I and III against them (Doc. 118). The Court granted the Individual Defendant’s motion for leave and plaintiff has responded (Doc. 141).

Count I

Count I was filed as a direct action against TransFinancial and the Individual Defendants for an alleged violation of § 271 of the Delaware Corporation Code, which requires shareholder authorization for the sale of substantially all of a corporation’s property. Although plaintiff originally attempted to characterize his action as “a deprivation of individual shareholders’ voting rights,” the Court found that “in essence, plaintiff’s claim is that the Individual Defendants breached their fiduciary duty and did not act in the best interest of the corporation when they sold the assets without shareholder approval. The gravamen of plaintiff’s complaint is injury to the corporation, seeking an accounting of the sale of corporate property and money damages, which must be asserted derivatively.” The Court further found that plaintiff had failed

⁷*Herbert Abstract Co., Inc. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990).

⁸*Butler v. City of Prairie Village*, 961 F.Supp. 1470, 1473 (D. Kan. 1997), *rev’d on other grounds*, 172 F.3d 736 (10th Cir. 1999)(citation omitted).

to allege that there was “any duty owed to him that was not owed to all shareholders of his status, or that he suffered any harm individually” in determining that this claim must be brought derivatively.

On January 21, 2003, plaintiff filed an Amended Complaint, as modified by the Court’s order dismissing TransFinancial and the secured creditors. The substance of Count I has changed for purposes of this motion to dismiss. In the first complaint, plaintiff merely alleged that the transfer of the Crouse assets violated § 271 and “as a result and direct consequence of this wrongful conduct, TFH and its stockholders have sustained damages.” By contrast, Count I of the amended complaint alleges:

70. The Individual Defendants’ failure to submit the proposed transfer of the Crouse Assets to TFH shareholders for their approval constituted a breach of their fiduciary duties to TFH and the TFH shareholders.
71. The Individual Defendants failed to disclose the proposed transfer of the Crouse Assets to TFH until after the sale was already consummated.
72. As a result and direct consequence of this wrongful conduct, TFH and its stockholders have sustained damages.

It appears that the Court’s reasoning regarding TransFinancial has a different application to Individual Defendants. Plaintiff sought money damages both from and on behalf of TransFinancial for the same alleged violation of § 271, which the Court held as derivative in nature. However, where a shareholder has suffered special injury resulting from a fiduciary’s failure to ensure that a sale of the corporation was entirely fair, such shareholder is entitled to

relief.⁹ Special injury is established “where there is a wrong suffered by plaintiff that was not suffered by all stockholders generally or where the wrong involves a contractual right of the stockholders, such as a right to vote.”¹⁰ In this case, plaintiff claims that the Individual Defendants breached their fiduciary duties to the shareholders by failing to submit the sale of the Crouse Assets for their approval, which violated the shareholders’ right to vote. This is enough to support a direct action against the Individual Defendants, at least for purposes of the pending motion to dismiss. The Court’s order dismissing the direct action against TransFinancial should be limited to the facts and the faulty pleading of the first complaint; it should not be construed as stating a § 271 claim can *never* be brought as a direct action. Accordingly, the Individual Defendants’ motion to dismiss Count I as a direct action is denied on this basis.

Count III

Count III asserts a derivative claim against all defendants except TransFinancial alleging that the sale by Crouse without TransFinancial shareholder approval constituted conversion. The Bank and the Pension Fund were secured creditors whose admittedly valid liens were satisfied by the proceeds of the sale. The Court found that the Bank and the Pension Fund were entitled to possession of the proceeds of the sale of their collateral and dismissed plaintiff’s conversion claims against the Bank and the Pension Fund. The Individual Defendants argue that the Court’s reasoning is equally true for them because giving the sale proceeds to someone entitled to have them is not conversion.

Conversion is the unauthorized assumption of the right of ownership over personal

⁹See generally *In re Tri-Star Pictures, Inc., Litig.*, Del. Supr., 634 A.2d 319 (1993).

¹⁰*Id.* at 330.

property belonging to another.¹¹ Because a lienholder has a right to possess the property subject to its lien, the lienholder does not commit conversion by taking possession of the encumbered property.¹² Although plaintiff failed to state a claim for conversion against the secured creditors, the Court disagrees that this absolves the other parties to the alleged conversion from liability as well. While the Court has reservations about the merits of a conversion claim under this relatively weakened scenario, its discretion to resolve the issue in the context of a Rule 12(b)(6) motion is constrained. Accordingly, Individual Defendants' motion to dismiss Count III is denied.

2. Remaining motions to dismiss and for judgment on the pleadings (Docs. 121, 143, 147 and 153)

From the Court's review of the remaining motions, it is apparent that all issues lead back to one central issue: whether the sale of the Crouse Assets constituted substantially all assets of TransFinancial so as to trigger § 271. If § 271 is not triggered, plaintiff's case will be subject to dismissal as a matter of law, since all claims stem from breach of that statutory obligation. Conversely, if § 271 is triggered, it will frame the issues raised in the pending motions to dismiss, such as: whether Individual Defendants breached a particular fiduciary duty and whether their actions were made in good faith; whether Del. C. § 102(b), the director exculpatory clause, is triggered; whether an action for conversion will lie; and whether an indemnity claim is plausible. Such an inquiry with respect to § 271 is factual in nature.¹³ As the Court stated in its

¹¹*Rogers v. Crum*, 168 Kan. 668, 672 (1950).

¹²*See Gillenwater v. Mid-American Bank and Trust Co.*, 19 Kan. App. 2d 420, 426 (1994).

¹³*Winston v. Mandor*, 710 A.2d 835, 843 (Del. Ch. 1997).

previous Order (Doc. 116), its discretion to resolve this issue in the context of a Rule 12(b)(6) motion is constrained by the highly subjective inquiry imposed by Delaware courts, and the issue would be more appropriately addressed on summary judgment after discovery is complete.

The Court further notes that it appears that events occurring subsequent to the filing of the pending motions may impact these proceedings. Specifically, the related case referred to by Individual Defendants as grounds for disqualifying plaintiff as a shareholder representative, *TransFinancial v. Lutin*, 02-2415-KHV, has been settled. The parties did not notify the Court of this settlement, nor have they filed any pleadings indicating the impact of the settlement on the pending motion. In addition, the related case of *Grogan v. O'Neil*, 03-2193-KHV, which also asserts claims against the Individual Defendants with respect to § 271, has recently been consolidated with this case for discovery purposes. The Court is therefore requesting that the parties address these issues and their affect on this case in any summary judgment pleadings.

The Court finds that the parties and the Court would be better served if the motions to dismiss and for judgment on the pleadings were denied without prejudice to refile after discovery is complete and motions for summary judgment would be appropriate. Although the Court recognizes that the parties and their counsel have put forth a great deal of effort in addressing the issues in this case, the problem is they are all intertwined with or contingent on a preliminary issue which has yet to be addressed—whether there was a violation of § 271. Given the posture of this case, deferral of the issues is not inappropriate—the discovery deadline is October 3, 2003, and the dispositive motion deadline is November 3, 2003. The pretrial conference is scheduled for October 21, 2003, and the trial is scheduled for May 10, 2004.

IT IS THUS ORDERED BY THE COURT that the Court denies without prejudice, the

following motions: Motion to Dismiss Third Party Complaint (Doc. 121); Motion to Dismiss Counts I and III (Doc. 132); Motion to Dismiss Class and Derivative Complaint; Motion to Dismiss R & L Cross-claim (Doc. 147); Motion for Judgment on the Pleadings or in the Alternative, to Dismiss (Doc. 153).

IT IS SO ORDERED.

Dated this 20th day of August 2003.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge